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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 INTELlicHECK MOBILISA, INC.,

11 Plaintiff,

12 v.

13 HONEYWELL INTERNATIONAL
14 INC.,

15 Defendant.

CASE NO. C16-0341JLR

ORDER DENYING DISCOVERY
MOTIONS

16 **I. INTRODUCTION**

17 Before the court are (1) Plaintiff Intellicheck Mobilisa, Inc.'s ("Intellicheck")
18 motion to compel production of documents (MTC (Dkt. # 59)); and (2) Defendant
19 Honeywell International Inc.'s ("Honeywell") second motion for a protective order (2d
20 MFPO (Dkt. # 66)). Specifically, Intellicheck seeks the production of documents
21 responsive to its First Requests for Production of Documents ("RFP") (MTC at 1), while
22 Honeywell seeks to prevent Intellicheck from obtaining discovery at this time (2d MFPO

1 at 1). The court has considered both motions, all submissions filed in support of and in
2 opposition to the motions, the balance of the record, and the relevant law. Neither party
3 has requested oral argument. Being fully advised, the court DENIES both motions.

4 II. BACKGROUND

5 This is a patent infringement case that has been ongoing since March of 2016, and
6 yet remains at the pleading stage. (*See* Compl. (Dkt. # 1) at 1.) Intellicheck commenced
7 this action on March 7, 2016 (*see id.*), and Honeywell moved to partially dismiss the
8 complaint on June 2, 2016 (MTD (Dkt. # 25)). In response, on June 20, 2016,
9 Intellicheck filed an amended complaint (Am. Compl. (Dkt. # 30) at 1), which rendered
10 Honeywell's motion to dismiss moot (6/28/16 Order (Dkt. # 34) at 1-2). Honeywell then
11 filed a motion to dismiss the amended complaint on July 8, 2016. (2d MTD (Dkt. # 37).)

12 Around the same time, Intellicheck initiated discovery. In July of 2016,
13 Intellicheck sent Honeywell 79 requests for admissions ("RFAs") (RFA (Dkt. # 65-1) at
14 4-8), and followed up a week later with 51 requests for production of documents (RFP
15 (Dkt. # 60-1) at 6-12). Intellicheck sought copies of "any and all product manuals,
16 specifications, schematics, manuals, drawings, guides, instructions and other documents
17 describing the functionality" of various Honeywell products. (*Id.* at 6.) It also demanded
18 any document identified in Honeywell's initial disclosure or in Honeywell's responses to
19 the RFAs (*id.* at 7); physical copies of the accused products and accompanying software
20 plug-ins, packaging, instructions, guides or labels (*id.* at 7-8); all documents and
21 communications relating to the predecessor of Intellicheck (*id.* at 8); all documents
22 related to the patents-in-suit (*id.* at 8-9); and all documents relating to opinions of counsel

1 about the patents-in-suit (*id.* at 9). Intellicheck additionally sought all documents related
2 to infringement, including information regarding prior art, the obviousness of any subject
3 matter claimed, why the accused product may or may not infringe, Honeywell's
4 awareness of the patents, any attempts to design or modify the products, and other
5 marketing and sales information. (*Id.* at 9-11.) Lastly, Intellicheck requested any and all
6 documents provided by certain individuals to Honeywell in reference to Intellicheck or
7 the patents at issue. (*Id.* at 11-12.)

8 These actions prompted Honeywell to file its first motion for a protective order,
9 asserting that Intellicheck's attempt to obtain discovery constituted a "fishing expedition"
10 inconsistent with Federal Rules of Civil Procedure 1 and 11. (MFPO (Dkt. # 39) at 1.)
11 Honeywell also served Intellicheck with numerous general and specific objections to the
12 RFPs in August of 2016. (*See generally* Resp. to RFP (Dkt. # 65-3).) For instance,
13 Honeywell objected generally to the RFPs "to the extent they seek production of
14 electronically stored information and trade secret, proprietary business information or
15 other confidential information" (*id.* at 2) and "to the extent they call for the production of
16 documents and information not in Honeywell's care, custody or control" (*id.* at 3).
17 Honeywell further objected specifically to each RFP, including objections that individual
18 requests were "overly broad," "unduly burdensome," "contrary to Federal Rule of Civil
19 Procedure 26(b)(1)'s proportionality limitations," "call[ing] for the production of
20 information protected from disclosure by the attorney-client privilege," or "calling for the
21 production of information that is available in the public domain." (*E.g., id.* at 13-14.)

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1 While both Honeywell's motion to dismiss and motion for a protective order were
2 pending, the parties jointly moved to stay proceedings and extend the case schedule so
3 that they could explore settlement options. (Stip. Mot. (Dkt. # 48) at 1-2.) The court
4 extended the case deadlines but declined to stay the case, and accordingly denied
5 Honeywell's two pending motions as moot, without prejudice to renewing them at a later
6 date. (10/28/16 Order (Dkt. # 49) at 1-2.)

7 Negotiations between the two parties broke down in May of 2017, and Intellicheck
8 requested leave to file a second amended complaint.¹ (MTA (Dkt. # 57).) Around the
9 same time, Intellicheck requested that Honeywell produce documents responsive to the
10 RFPs that were previously served. (Davis Decl. (Dkt. # 60) ¶ 5.) However, Honeywell
11 produced no documents. (*Id.* ¶ 6.) The parties, in compliance with Federal Rule of Civil
12 Procedure 37(a) and Local Civil Rule 37(a)(1), held a conference on July 24, 2017, to
13 discuss this matter. (*Id.* ¶ 7); *see also* Fed. R. Civ. P. 37(a)(1); Local Rules W.D. Wash.
14 LCR 37(a)(1). They were unable to come to an agreement regarding any of the 51 RFPs:
15 Honeywell informed Intellicheck that it would not be producing the requested documents
16 and that it would instead be renewing its motion for a protective order. (Davis Decl. ¶ 7.)

17 A few days later, Intellicheck filed its motion to compel production of documents.
18 (MTC at 1.) Honeywell then filed its second motion for a protective order. (2d MFPO at
19 1.) The court considers each motion in turn.

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21 ¹ The court granted this motion on August 30, 2017 (8/30/17 Order (Dkt. # 73)), and
22 Intellicheck filed its second amended complaint against Honeywell on September 6, 2017 (SAC
(Dkt. # 74)).

III. ANALYSIS

A. Intellicheck's Motion to Compel

Intellicheck asserts that it seeks documents that are relevant to the parties' claims and defenses, proportional to the needs of the case, and are neither privileged nor subject to the work product immunity. (MTC at 2-3.) Moreover, it argues that discovery should not be stayed simply because Honeywell may be filing a motion to dismiss in the future, as a stay of discovery pending a motion to dismiss should not be entered if the motion would not be dispositive of the entire case. (*Id.* at 3.)

A party may move to compel discovery if the movant has in good faith conferred with the party opposing discovery to obtain the requested discovery without the court's intervention. *See* Fed. R. Civ. P. 37(a)(1). The moving party bears the burden of demonstrating that the information it seeks is relevant and that the responding party's objections lack merit. *See Bluestone Innovations LLC v. LG Elecs., Inc.*, No. C-13-01770-SI (EDL), 2013 WL 6354419, at *2 (N.D. Cal. Dec. 5, 2013). The party must therefore "inform the Court which discovery requests are the subject of the motion to compel, and, for each disputed response, why the information sought is relevant and why the responding party's objections are not meritorious." *Hancock v. Aetna Life Ins. Co.*, --- F. Supp. 3d. ---, 2017 WL 3085744, at *4 (W.D. Wash. July 20, 2017) (quoting *Adams v. Yates*, No. 1:10-cv-0671-AWI-MJS, 2013 WL 5924983, at *1 (E.D. Ca. Nov. 1, 2013)).

Intellicheck's motion to compel is incomplete, and as such, inadequate. Intellicheck does not inform the court why the information sought in each disputed RFP

1 is relevant; it simply asserts that it generally “seek[s] only material relevant to the parties’
2 claims and defenses” without specifically addressing any of the information sought in the
3 fifty-plus RFPs. (MTC Reply (Dkt. # 68) at 2; *see generally* MTC.) In fact, aside from
4 an admission in a footnote that RFP 27 is premature (MTC at 3 n.1) and a quotation of
5 RFP 8 in a parenthetical (MTC Reply at 2), Intellicheck does not explicitly mention any
6 of the other RFPs, or the information they seek, in its motion to compel briefing (*see*
7 *generally* MTC; MTC Reply).

8 Nor does Intellicheck explain why Honeywell’s voluminous objections to the
9 RFPs are not meritorious. Intellicheck claims that “the only objections that Honeywell
10 has asserted . . . are the ones it raised in its former Motion for Protective Order, which the
11 [c]ourt has denied as moot.” (MTC at 3 (internal citations omitted).) But this claim flies
12 in the face of the 42 pages of objections that Honeywell served on Intellicheck in
13 response to the RFPs. (*See generally* Resp. to RFP.) Intellicheck ignores the bulk of
14 Honeywell’s objections in its motion to compel, saying nothing about Honeywell’s
15 concerns regarding proportionality, privileged information, work product, and the
16 availability of requested information in the public domain. (*See* MTC; MTC Reply.)²
17 Thus, Intellicheck provides the court with no information on why it believes Honeywell’s
18 many objections to be inadequate.

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20 ² Intellicheck concedes that it does not address any of Honeywell’s individualized
21 objections, but argues that those objections are irrelevant because “[it] is unaware of any
22 documents Honeywell actually withheld based on those objections.” (MTC Reply at 4.)
To the contrary, those objections form the crux of a motion to compel, *see Hancock*, 2017
WL 3085744, at *4, and Intellicheck cannot excuse itself from addressing them simply
because it finds them irrelevant.

1 Without such information, the court is not in a position to ascertain whether the
2 information Intellicheck seeks is discoverable, or whether Honeywell's objections are
3 meritorious. Accordingly, the court DENIES Intellicheck's motion to compel without
4 prejudice to Intellicheck refiling the motion with the requisite information alluded to
5 above.

6 **B. Honeywell's Renewed Motion for a Protective Order**

7 Honeywell moves for a protective order to prevent Intellicheck from obtaining
8 discovery. First, it notes that Intellicheck is improperly utilizing discovery as a "fishing
9 expedition" to obtain information that they could then use to bring a legally sufficient
10 complaint. (2d MFPO at 7-11.) Second, Honeywell maintains that it will renew its
11 motion to dismiss the entire case, thus potentially negating the need for any further
12 discovery. (*Id.* at 11.) Third, it points out that Intellicheck's second amended complaint
13 drops all counts of contributory infringement and thus should narrow the scope of the
14 RFPs. (*Id.*) And lastly, Honeywell states that it has filed a petition for CBM review with
15 the United States Patent and Trademark Office ("USPTO"), and it urges the court to
16 delay discovery given the "extremely high likelihood some or all of the discovery will be
17 mooted by the CBM proceedings." (*Id.* at 12.)

18 Intellicheck counters that a protective order is improper because Honeywell has
19 failed to make a showing of good cause, as required by Federal Rule of Civil Procedure
20 26(c)(1). (2d MFPO Resp. (Dkt. # 71) at 3.) Intellicheck denies that the requested
21 discovery is being utilized to supplement pleadings and maintains that all requested
22 information is relevant to the suit. (*Id.* at 5-7.) Moreover, it purports that potential future

1 filings of motions to dismiss, or petitions for CBM review, do not constitute good cause.
2 (*Id.* at 7-9.) Lastly, Intellicheck asserts that it would be prejudiced by a protective order
3 because such an order would restrict “the time its experts have to analyze the relevant
4 facts” and affect its ability to take depositions. (*Id.* at 9-10.)

5 On a showing of good cause, the court may issue a protective order pursuant to
6 Federal Rule of Civil Procedure 26(c) “to protect a party or person from annoyance,
7 embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c). For
8 good cause to exist, the party seeking the protective order must first show that it will
9 suffer “specific prejudice or harm” if the court does not issue a protective order. *Phillips*
10 *ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002);
11 *Miller v. York Risk Servs. Grp.*, No. CV-13-01419-PHX-JWS, 2014 WL 11515634, at *2
12 (D. Ariz. June 20, 2014) (stating that good cause is generally shown when disclosure
13 would lead to “a clearly defined, specific and serious injury”). The showing must be
14 particularized; “broad allegations of harm, unsubstantiated by specific examples or
15 articulated reasoning, do not satisfy the Rule 26(c) test.” *In re Roman Catholic*
16 *Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011) (quoting *Beckman*
17 *Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)) (internal quotation marks
18 omitted). If a court finds that particularized harm will result from disclosure, the burden
19 then shifts to the nonmoving party “to show that disclosure is ‘relevant and necessary’ to
20 the presentation of its case.” *UCC Ueshima Coffee Co. v. Tully’s Coffee Corp.*, No. C06-
21 1604RSL, 2007 WL 710092, at *2 (W.D. Wash. Mar. 6, 2007) (quoting *Hartley Pen Co.*
22 *v. U.S. Dist. Ct.*, 287 F.2d 324, 328 (9th Cir. 1961)). The court subsequently balances the

1 risk of disclosure against the risk that a protective order will impair prosecution or
2 defense of the claims. *See Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470
3 (9th Cir. 1992); *UCC Ueshima Coffee Co.*, 2007 WL 710092, at *2.

4 Here, the inquiry ends at the first step, because Honeywell has failed to show that
5 particularized harm will result from the production of documents. Honeywell first argues
6 that Intellicheck is engaging in a fishing expedition to bolster its pleadings, and thus
7 “good cause exists for postponing the date that Honeywell is required to produce
8 documents.” But beyond this general statement, Honeywell provides no particularized
9 showing of the specific harm that would occur if the protective order is not issued.
10 Instead, it recites only that Intellicheck’s various iterations of its complaint are
11 “deficient” (*see* 2d MFPO at 8-11), and thus presumably constitutes an undue burden or
12 expense (*see* 2d MFPO Reply (Dkt. # 72) at 3). This “broad allegation[.]” of harm,
13 “unsubstantiated by specific examples or articulated reasoning,” is insufficient to
14 constitute good cause under Rule 26(c). *See In re Roman Catholic Archbishop*, 661 F.3d
15 at 424. Accordingly, the court will not issue a protective order on this ground.³

16 The two cases that Honeywell relies upon do not change the court’s analysis. At
17 the outset, neither case dealt with the issuance of a protective order. *See In re*.

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19 ³ Honeywell also asserts that several of Intellicheck’s RFPs seek information in violation
20 of Local Patent Rule 112. (2d MFPO at 9); Local Rules W.D. Wash. LPR 112. But Rule 112
21 does not directly bear on the need for a protective order. *See id.* LPR 112 (allowing party to
22 object to discovery requests for certain categories of information “on the ground that they are
premature”). And Honeywell does not articulate, beyond the fact that certain RFPs are
premature, why production of those documents pursuant to the correct timetable would cause
specific prejudice or harm. (*See* 2d MFPO; 2d MFPO Reply.) Thus, the fact that some RFPs
may violate Rule 112 does not warrant a protective order.

1 *Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig.*, No. 08-1905 (RHK/JSM), 2009
2 WL 294353, at *4 (D. Minn. Feb. 5, 2009); *Bergin v. Teamsters Local Union No. 77*,
3 2011 WL 486230, at *1 (E.D. Penn. Feb. 4, 2011). Thus, neither case underwent a Rule
4 26(c) analysis of good cause, particularized harm, or a balancing of the interests involved.
5 *See id.* And neither case ultimately issued a protective order. *See id.*

6 Moreover, both cases involved situations where the operative complaint had
7 already been deemed deficient. The *In re Medtronic* court had previously dismissed the
8 complaint with prejudice, and because the plaintiffs “[had] failed to allege any viable
9 causes of action,” they were not permitted to obtain discovery. 2009 WL 294353, at
10 *1-2. Similarly, in *Bergin*, the plaintiff conceded that she could not plead facts necessary
11 to raise a plausible claim, and the court rejected her request to amend her complaint after
12 seeking discovery. 2011 WL 486230, at *2. In those scenarios, where the complaint is
13 unquestionably lacking, conducting discovery in hopes of finding a viable cause of action
14 is improper. Here, by contrast, the court has not addressed the adequacy of the operative
15 complaint. (*See generally* Dkt.) And despite Honeywell’s repeated admonishments of
16 the complaint’s inadequacy, that alone is not equivalent to the dismissal in *In re*
17 *Medtronic* or the concession in *Bergin* that counseled against discovery. Thus,
18 Honeywell has failed to demonstrate good cause warranting the issuance of a protective
19 order based upon Intellicheck’s allegedly improper discovery tactics.

20 Nor does the Second Amended Complaint’s potential to narrow the scope of
21 discovery warrant a protective order. (*See* 2d MFPO at 11.) Honeywell is correct that
22 the Second Amended Complaint removed all contributory infringement counts. (*See id.*

1 at 11; *see also*, e.g., SAC at 15.) But that fact alone does not articulate what clearly
2 defined and serious injury Honeywell would suffer if a protective order is not issued. *See*
3 *Miller*, 2014 WL 11515634, at *2. Therefore, the court cannot issue a protective order
4 simply because the Second Amended Complaint has the potential to narrow the scope of
5 discovery.

6 Lastly, Honeywell's potential filings in the future do not constitute good cause for
7 the issuance of a protective order. (*See* 2d MFPO at 11-12.) Honeywell repeatedly
8 asserts in its briefing that it will be filing a motion to dismiss the operative complaint or a
9 motion to stay the proceedings based upon the CBM review process, and that either
10 motion warrants a protective order at this time. (2d MFPO at 11-12; 2d MFPO Reply at
11 3-4.) Honeywell is mistaken. First, a pending motion to dismiss "is not grounds for
12 staying discovery." *Old Republic Title, Ltd. v. Kelley*, No. C10-0038JLR, 2010 WL
13 4053371, at *4 (W.D. Wash. Oct. 13, 2010); *see also Gray v. First Winthrop Corp.*, 133
14 F.R.D. 39, 40 (N.D. Cal. 1990) ("The intention of a party to move for judgment on the
15 pleadings is not ordinarily sufficient to justify a stay of discovery."). Here, Honeywell
16 does not demonstrate why its pending motion to dismiss, filed just a day ago, would run
17 counter to the general rule as stated in *Old Republic Title*.⁴ *See* 2010 WL 4053371, at *4.

19 ⁴ Honeywell purports that a stay of discovery is appropriate pending the resolution of a
20 potentially dispositive motion. (2d MFPO at 6 (citing *Johnson v. N.Y. Univ. Sch. Of Educ.*, 205
21 F.R.D. 433, 434 (S.D.N.Y. 2002).) But this assertion is only true if the motion "appear[s] to
22 have substantial grounds." *Johnson*, 205 F.R.D. at 434. Given that no motion to dismiss had
been filed at the time of the briefing—and one was just recently filed with no response or
reply—the court is unable to ascertain whether the motion appears to have substantial grounds.
Thus, the court rejects this argument.

1 Moreover, the parties significantly disagree about whether a petition for CBM review
2 would dispose of this matter. (*Compare* 2d MFPO at 12, *with* 2d MFPO Resp. at 8-9.)
3 The court will not, at this point, wade into the statistical likelihood that this matter will be
4 disposed of, based upon a hypothetical motion to stay proceedings that has not yet
5 materialized. Nor will the court grant a protective order on this elusive basis.

6 In sum, Honeywell has not demonstrated how it will suffer specific prejudice or
7 harm if a protective order is not issued and in turn, has not shown good cause.⁵

8 Accordingly, the court DENIES Honeywell's renewed motion for a protective order.

9 Although the court denies both parties' motions, it recognizes the parties' need for
10 guidance in this stalled discovery process. The court finds it patently unreasonable that
11 Honeywell has not identified even a single document that can be produced in response to
12 Intellicheck's RFPs. And since the court has now denied Honeywell's motion for a
13 protective order, the court expects both parties to reconvene on this matter. Honeywell is
14 directed to reexamine the RFPs in an effort to identify documents that can be turned over
15 to Intellicheck as requested. If there is further disagreement, the court gives Intellicheck
16 leave to file another motion to compel with the necessary specificity as detailed above in
17 the order.

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21 ⁵ Because Honeywell has failed to show particularized harm, the court does not need to
22 consider whether the requested disclosure is relevant and necessary, or balance the parties'
respective interests. *See Brown Bag Software*, 960 F.2d at 1470.

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Dated this 21st day of September, 2017.


JAMES L. ROBERT
United States District Judge